Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,

Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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Opinions Below

The opinion of the Court of Appeals (R. 79a-89a)[1] is reported at 383 F. 2d 364. The opinion of the District Court (R. 75a-78a) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on September 20, 1967 (R. 90a-91a). The petition for a writ of certiorari was granted on January 29, 1968 (R. 91a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

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[1] "R" refers to the Joint Appendix filed in this Court.

Questions Presented

1. Were the dismissals from public employment of the individual petitioners, pursuant to Section 1123 of the New York City Charter, in violation of their privilege against self-incrimination, their right to due process and their immunities and privileges under the Fourteenth Amendment?

2. Were the dismissals from public employment, resulting from wiretapping of the employees' telephone conversations without the participants' consent, unlawful because the wiretapping violated the Federal Communications Act of 1934, 47 U.S.C. § 605, the employees' constitutional right to privacy and the prohibition of the Fourth and Fourteenth Amendments against unlawful search and seizure?

Statutes Involved

The state statutes are Section 1123 of the New York City Charter, Appendix, *infra*, p. 26, and Section 813-a of the New York Code of Criminal Procedure, Appendix, *infra*, p. 26.

The federal statute is the Federal Communications Act of 1934, 47 U.S.C. §§ 501, 605, Appendix, *infra*, pp. 27-28.

Statement

Uniformed Sanitation Men Association, Inc. (herein called the "Union") is a labor union, the collective bargaining agent for approximately 10,000 sanitationmen employed by the Department of Sanitation, and a party to a collective bargaining agreement with the City of New York on behalf of those employees (R. 4a). The other petitioners (herein called the "petitioners") are employees of the Department of Sanitation with long tenure and un-

blemished departmental and military records; most of them are members of and represented by the Union (R. 5a).

In November, 1966, the Commissioner of Investigation of the City of New York conducted an investigation of employees of the Department of Sanitation in the course of which he placed a wiretap upon the telephone at their place of employment pursuant to an order of a Justice of the New York Supreme Court under Section 813-a of the Code of Criminal Procedure (R. 72a-81a) and intercepted, recorded and divulged their conversations (R. 7a, 18a).

In the same month the Commissioner directed each of the individual petitioners to appear before him in separate hearings conducted under oath and stenographically recorded (R. 57a). He charged them with criminal behavior (R. 42a), and informed them that he had recordings of their telephone conversations, some of which he played back to them (R. 7a, 61). The Commissioner also informed the petitioners that they were entitled to assert their constitutional privilege against self-incrimination, but that if they did so, they would be dismissed from employment pursuant to Section 1123 of the New York City Charter. He said:

> "You are further advised that if you do refuse to testify or to answer any question regarding the affairs of the City or regarding your official conduct or the conduct of any other officer or employee of the City on the ground that your answer would tend to incriminate you, your term or tenure of office or employment shall terminate and you shall not be eligible to election or appointment to any office or employment under the City or any agency, in accordance with the provisions of Section 1123 of the New York City Charter." (R. 74a).

Twelve of the petitioners asserted their privilege against self-incrimination (R. 6a). Thereupon, the Com-

missioner of Sanitation, their employer, suspended them for invoking the privilege, and served them with charges to that effect (R. 45a). The Court of Appeals (herein called the court below) correctly concluded that "[t]he twelve who had invoked the privilege against self-incrimination were advised that their suspensions were based on their refusals to testify as provided by Section 1123 of the City Charter" (R. 83a-84a). Subsequently, as the Court of Appeals said, "[t]he twelve appellants who had invoked the privilege against self-incrimination were dismissed from their positions" (R. 85a) after departmental hearings. "The evidence on which the dismissals were based", said the court, "consisted of the transcripts of the proceedings before the Commissioner of Investigation in which the appellants had asserted the privilege. Section 1123 of the City Charter was cited as the legal basis for the dismissals" (R. 85a-86a).

Three other petitioners who answered the Commissioner of Investigation's questions and denied their guilt were suspended on December 2, 1966 by the Commissioner of Sanitation by reason of "information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation" (R. 84a). These petitioners were summoned before a grand jury and asked to sign waivers of immunity (R. 86a). Upon their refusal, the Department of Sanitation served them with amended charges "alleging that by refusing to waive their immunity they had violated Section 1123" (R. 86a). They, too, were given hearings not on the charges of wrongdoing but on charges limited to the refusal to waive immunity. On February 9, 1967, the Commissioner of Sanitation dismissed them from employment in accordance with Section 1123 of the New York City Charter solely because they had refused to execute waivers of immunity before the grand jury (R. 86a).

The petitioners thereupon sued for a declaratory judgment that the suspensions and discharges were illegal

because Section 1123 of the Charter violated the employees' rights under the Fifth and Fourteenth Amendments to the United States Constitution and because the wiretapping violated the Federal Communications Act of 1934, 47 U.S.C. § 605, and impaired their right to privacy and their right against unlawful search and seizure under the Fourteenth Amendment (R. 9a-10a). They also sought discovery and an injunction against the continuation of such illegal conduct (R. 10a).

The district court denied petitioners' motion for preliminary injunction and for discovery, and granted the respondents' motion to dismiss the complaint, declining to exercise jurisdiction on the basis of the abstention doctrine (R. 75a-78a). It emphasized that its decision "is in no manner a determination by this court that Section 813-a of the New York Code of Criminal Procedure and Section 1123 of the Charter of the City of New York are constitutional" (R. 77a). It added that "[t]his court is confident that the state courts of New York are sensitive to and will give careful consideration to the very serious constitutional issues that the plaintiffs have raised herein" (R. 77a-78a).

The Court of Appeals decided the case upon the merits because of further administrative action taken in the Department of Sanitation after the district court's decision and because an intervening decision of the New York Court of Appeals had "removed any ground there may have been for federal abstention" (R. 86a). It affirmed the dismissal of the complaint holding (i) that petitioners had no constitutional privilege against self-incrimination to refuse "to answer questions as to their conduct in office" (R. 87a), and (ii) that the wiretapping had violated neither the Federal Communications Act, 47 U.S.C. § 605 nor petitioners' constitutional rights (R. 88a).

Summary of Argument

I. The Constitutional Privilege Against Self-Incrimination.

A. The decision below is in direct conflict with the Court's decision in *Slochower* v. *Board of Education*, 350 U.S. 551, which held that the identical City Charter provision violated the due process clause of the Fourteenth Amendment because public employment was automatically terminated upon assertion of the constitutional privilege.

The court below erroneously relied upon the Court's decision in *Nelson* v. *County of Los Angeles*, 362 U.S. 1. That decision is of doubtful validity in the light of the Court's later decisions in *Malloy* v. *Hogan*, 378 U.S. 1, and *Spevack* v. *Klein*, 385 U.S. 511. In any event, it is inapposite since it involved a statute which made no reference to the privilege against self-incrimination. Other cases relied upon by the respondents involve statutes not directed against the privilege and expressly reaffirm *Slochower*.

B. The decision below is also inconsistent with the Court's decision in *Malloy* v. *Hogan*, *supra*, that the "Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states." *Id.* at 6.

This principle has been applied by the Court in two different situations; first, to invalidate criminal convictions of public employees based upon evidence obtained from them under a state statute compelling them to make such statements or be discharged from employment, *Garrity* v. *State of New Jersey*, 385 U.S. 493; second, to invalidate the disbarment of a lawyer for invoking his constitutional privilege in refusing to answer questions in disciplinary proceedings, *Spevack* v. *Klein*, *supra*.

C. It is not necessary to determine in this case the broad question of a public employee's duty generally to

answer his employer's questions. The petitioners were dismissed, as required by the New York City Charter, because they asserted their constitutional privilege in the course of a criminal investigation initiated and conducted by the Commissioner of Investigation. He secured a wiretap order pursuant to a New York criminal law (subsequently held unconstitutional by the Court in *Berger* v. *New York*, 388 U.S. 41), and conducted a formal hearing under oath and stenographically recorded. He charged the petitioners with crime and turned over his "evidence" to the District Attorney who subpoenaed some of the petitioners to appear before a grand jury.

D. The Court of Appeals was in error, in view of the mandatory language of the Charter, in deciding the issue of an employee's duty to answer questions.

The imposition of such a duty by the court below imposed a penalty upon assertion of the privilege. It ignored the Court's liberal construction of the privilege. It rejected the accusatorial system of justice written into modern civil service law. These views are reflected in the plurality opinion of the Court in *Spevack* v. *Klein, supra,* which was not discussed or even cited by the court below. The earlier decision relied upon by it, *Nelson* v. *County of Los Angeles, supra,* was, we believe, incorrectly decided. Therefore, if the issue is reached, the Court should adopt the dissenting opinions in that case.

II. The Unlawful Wiretapping.

A. The wiretapping violated the clear mandate of the Federal Communications Act of 1934, 47 U.S.C. § 605, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person." The statute has received a broad construction from the Court

in view of the importance of its congressional objective. See *Nardone* v. *United States,* 302 U.S. 379, 308 U.S. 338. Petitioners' dismissals after an investigation initiated by wiretapping were therefore the "fruits of the poisonous tree". *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392; see *Nardone* v. *United States,* 308 U.S. 338.

B. The wiretapping was an unreasonable search and seizure and a violation of the right of privacy of the employees under the Fourth and Fourteenth Amendments. It constituted an "unjustifiable intrusion by the Government upon the privacy of the individual" (Mr. Justice Brandeis dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 478). It also violated the standards of due process required of the states under the Fourteenth Amendment. Finally, the wiretapping was made pursuant to an order of a New York State Supreme Court Justice under Section 813-a of the New York Code of Criminal Procedure which the Court held unconstitutional in *Berger* v. *United States, supra.*

The Court of Appeals was in error in ruling that the petitioners had no rights under the statute and Constitution because the wiretapped telephone was leased by the City. The statute makes no exception based upon property rights, and the Court has held that "the principal object of the Fourth Amendment is the protection of privacy, rather than property." *Warden, Maryland Penitentiary* v. *Hayden,* 387 U.S. 294, 304. That principle was recently applied to invalidate a conviction based upon a listening device outside a telephone booth. *Katz* v. *United States,* 389 U.S. 347.

C. Increasing governmental surveillance of public employees and private citizens has led to widescale invasions of privacy. The wiretapping engaged in here must be condemned if that privacy is to be protected.

ARGUMENT

I.

The decision below, in disregard of the decision in *Slochower* v. *Board of Education*, 350 U.S. 551, upholds the automatic termination of public employment upon invocation of the privilege against self-incrimination.

A. The identical Charter language was held in *Slochower* to deny due process because assertion of the privilege automatically terminated employment.

The decision below is squarely in conflict with the Court's decision in *Slochower* v. *Board of Education, supra,* which held that Section 903 of the New York City Charter, as interpreted and applied by the New York courts, violated the due process clause of the Fourteenth Amendment. That section (identical in language with the present Section 1123) provided that when any city employee refused to testify concerning city affairs "on the ground that his answer woud tend to incriminate him, or shall refuse to waive immunity from prosecution . . . his term or tenure of office or employment shall terminate."

The New York Court of Appeals in *Daniman* v. *Board of Education of the City of New York,* 306 N.Y. 532, 119 N.E. 2d 373 (1954), *appeal dismissed,* 348 U.S. 993, had construed Section 903 to provide for the automatic dismissal of City employees who assert their privilege against self-incrimination:

> "The assertion of the privilege against self-incrimination is equivalent to a resignation.
>
> • • •
>
> There is nothing novel about such a statute. Other statutes provide for the vacatur of, or forfeiture of, an office or employment upon the happening of an event specified therein." 306 N.Y. at 538-539.

In *Slochower* v. *Board of Education, supra,* the constitutionality of Section 903 was considered by the Court as to Dr. Slochower since he alone of the plaintiffs in the *Daniman* group of cases had properly raised the federal issues in the state courts. The Court reversed the New York Court of Appeals, holding that the dismissal of Dr. Slochower for assertion of the privilege was a denial of due process under the Fourteenth Amendment. The Court condemned "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Id.* at 557. It stated:

> "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Id.* at 557-8.
>
> * * *
>
> "With this in mind, we consider the application of § 903. As interpreted and applied by the state courts, it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman* v. *Updegraff, supra.*" *Id.* at 558.

In short, the Court in *Slochower* held Section 903 of the Charter unconstitutional on the ground that the statute, as interpreted by the New York Court of Appeals, violated due process by requiring the automatic discharge from employment of every city employee who invoked the Fifth Amendment.

Despite the Court's direct holding in *Slochower* that Section 903 was unconstitutional, Section 1123, identical in language with Section 903, was enacted in November, 1961. This section served as the basis for the warning by the Commissioner of Investigation that if any employee asserted his constitutional privilege, he would be dismissed from his employment (R. 75a). Indeed twelve employees were dismissed for asserting their constitutional privilege (R. 85a), while the remaining three were dismissed for refusing to waive immunity before a grand jury (R. 86a).[2]

The Court of Appeals, in spite of the controlling effect of *Slochower*, did not even mention that decision. Instead, it based its decision upon *Nelson* v. *County of Los Angeles*, *supra* (R. 87a). That case does not support the decision below since *Nelson* involved a dismissal from employment pursuant to a statute which "made no reference to Fifth Amendment privileges", *id.* at 7. The Court in *Nelson* did not overrule *Slochower*; it reaffirmed and distinguished it on the ground that "the New York statute under which Slochower was discharged specifically operated 'to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge.' . . ." *Ibid.* The Court upheld petitioners' present analysis of the New York City Charter by stating:

> "This 'built-in" inference of guilt, derived solely from a Fifth Amendment claim, we held to be arbitrary and unreasonable. But the test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any 'built-in' inference of guilt in its statute, but solely on employee insubordination for failure to give information which we have held that the State has a legitimate interest in securing." *Ibid.*

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[2] The case of the remaining employee, John Alessio, is moot (R. 83a, n. 6).

In view of the controlling effect of *Slochower*, the court below was quite correct in not deeming applicable the decisions in *Lerner* v. *Casey*, 357 U.S. 468, and *Beilan* v. *Board of Education of Philadelphia*, 357 U.S. 399, which the respondents had urged upon it. But since the respondents relied upon those cases in their opposition to the petition for certiorari in this case,[3] it is appropriate to indicate again the distinction between the *Lerner-Beilan* type of case and the present one. Whatever may be the viability today of those closely divided decisions, particularly in the light of *Malloy* v. *Hogan, supra*, they are distinguishable because neither involved the validity of a statute requiring the automatic dismissal of a public employee who asserted his constitutional privilege against self-incrimination.

Lerner v. *Casey, supra*, upheld a statutory mandate that persons "of doubtful trust and reliability" be dismissed from a so-called security agency. The Court held that the refusal to answer certain questions justified "a finding of doubtful trust and reliability." *Id.* at 476. The Court specifically pointed out, however, at p. 477, that the employee's discharge "was not based on the fact that the employee had asserted Fifth Amendment rights." In addition, the Court noted, at p. 478, that "the federal privilege against self-incrimination was not available to appellant through the Fourteenth Amendment in the state investigation," a view subsequently overruled by the decision in *Malloy* v. *Hogan, supra*.

In *Beilan* v. *Board of Education of Philadelphia, supra*, the Court upheld a school teacher's dismissal for "incompetency" where the "incompetency" was evidenced by the teacher's refusal "to confirm or refute information as to the teacher's loyalty and his activities in certain allegedly subversive organizations." *Id.* at 400. Again there was no statute declaring an office vacant upon invocation of the privilege against self-incrimination.

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[3] Brief in opposition to petition for certiorari, p. 7.

B. The Charter violates the privilege against self-incrimination.

The decision below is inconsistent with a line of decisions in the Court subsequent to *Slochower* holding that the Fourteenth Amendment prohibits not only arbitrary and summary dismissal from public employment but also compulsory self-incrimination by the states. In *Malloy* v. *Hogan, supra,* the Court held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States." 378 U.S. 1, 6. This principle has been repeatedly applied by the Court in subsequent decisions, *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U.S. 52; *Stevens* v. *Marks,* 383 U.S. 234; *Spevack* v. *Klein, supra;* and *Garrity* v. *State of New Jersey, supra.*

In *Garrity, supra,* the Court held it to be a violation of the Fourteenth Amendment to admit into evidence in a criminal proceeding the statements of police officers obtained from them under a state statute that compelled them to make such statements or be discharged from employment. The Court said:

> "The choice given appellants was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Garrity* v. *New Jersey, supra,* at 497.

In citing and distinguishing the celebrated statement of Mr. Justice Holmes in *McAuliffe* v. *New Bedford,* 155 Mass. 216, 29 N.E. 517 (1892), that one "has no constitutional right to be a policeman," the Court said:

> "Our question is whether the Government, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee."

* * *

> "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity* v. *New Jersey, supra,* at 499-500.

In *Spevack* v. *Klein, supra,* the Court upheld the right of a lawyer to assert his constitutional privilege in disciplinary proceedings. While the Court left open the question of a public employee's right to refuse to answer questions in a general investigation of his conduct, regardless of the ground of the refusal, *id.* at 516, none of the Justices of the Court questioned the *Slochower* decision; implicit also was the recognition that under *Malloy* v. *Hogan, supra,* and *Griffin* v. *California,* 380 U.S. 609, a statute of the kind here involved violated the privilege against self-incrimination.

The court below sought to distinguish only *Garrity* v. *New Jersey, supra,* by stating that its "holding has no application to the present case where the employees did not testify, but relied upon their claims of privilege" (R. 87a). While it is true that *Garrity* involved the use in a criminal proceeding of "testimony which was coerced by threat of loss of employment" (R. 87a), the principle upon which it stands is undermined by the decision of the court below. If the fruits of an illegal coercion cannot be used in a criminal proceeding, *cf. Silverthorne Lumber Co.* v. *United States, supra,* surely the employee cannot be dismissed for refusing to yield to such coercion. In one case the employee yields to the coercion and perhaps incriminates himself, and in the other case he does not yield and is dismissed from employment.

In both cases the state's action is offensive to the liberal construction which the Court has given to the privilege against self-incrimination in a variety of contexts. *Quinn* v. *United States,* 349 U.S. 155; *Emspak* v. *United States,* 349 U.S. 190; see *Ullman* v. *United States,* 350 U.S. 422; *Marchetti* v. *United States,* — U.S. —, 36 U.S.L. Week 4143 (January 30, 1968). Both types of state

sanctions are forbidden by the Court's holding in *Malloy* v. *Hogan, supra,* that "the Fourteenth Amendment secures against state invasion . . . the right of a person to remain silent and to suffer no penalty . . . for such silence." 378 U.S. at 8.

C. This case, involving a criminal investigation, does not involve the duty of the public employee to answer his employer's questions concerning the performance of duty.

This case does not present the question left open in *Stevens* v. *Marks, supra,* and *Spevack* v. *Klein, supra,* at 516, as to "[w]hether a policeman, who invokes the privilege when his conduct as a police officer is questioned . . . may be discharged for refusing to testify." That question need not be resolved here because the employees were suspended and dismissed in the course of criminal investigations for refusing to surrender their privilege or to waive immunity against criminal prosecution.

That these were criminal investigations is obvious from the nature of the proceedings, the status of those in charge and the techniques used by them. The Commissioner of Investigation wiretapped the employees' telephone conversations pursuant to a statute requiring "reasonable ground and belief that evidence of crime may be thus obtained." New York Code of Criminal Procedure § 813-a (R. 81a). Conducting the hearing in the absence of the employees' Sanitation Department supervisors, he advised the employees of their constitutional privilege against self-incrimination, charged them with crime (R. 82a) and turned over his evidence to the District Attorney. The latter then subpoenaed three of the employees to appear before a grand jury where he requested them to waive immunity against prosecution and declined to interrogate them when they refused to execute such waivers (R. 11a).

This was certainly not a disciplinary proceeding conducted by an employer. Sanitation officials were not

present in the hearings conducted by the Commissioner of Investigation nor, of course, before the grand jury (R. 18a). An inquiry into fitness would have included a reasoned evaluation of the employees' job performance, of the charges and evidence against them and of their refusal to answer particular questions. Instead, here, we have an automatic dismissal from employment required by a City Charter provision which the Court had declared unconstitutional twelve years earlier.

D. Even absent a statute specifically directed against the privilege, a public employee may not be discharged for relying upon the privilege in an investigation of his conduct.

The Court's decision in *Slochower* striking down the identical Charter provision as unconstitutional, as well as the nature of the criminal investigation in this case, makes it unnecessary to reach the broader issue of whether, in the absence of a statute specifically penalizing invocation of the privilege, a public employee's invocation of the privilege bars his dismissal from employment.

However, the Court of Appeals disregarded the clear language of the Charter provision, refused to follow the Court's decision in *Slochower* and addressed itself to the broader problem (R. 87a). Accordingly, comment on the point is appropriate. The court below offered no explanation for its conclusion and rested, instead, upon the rhetorical question, "Can there be any reasonable doubt that an employee, especially one who has been warned of the consequences of his refusal to answer can be (and, indeed, should be) discharged for such refusal?" (R. 87a).

We believe that the lower court's answer is objectionable in principle, from three points of view. (1) It imposes a penalty upon assertion of the privilege despite the Court's decision in *Malloy* v. *Hogan, supra;* the loss of employment in this context is such a penalty, *Spevack* v. *Klein, supra,*

at 516. (2) It seeks to reverse the Court's liberal construction of the privilege. (3) It rejects an accusatorial system of justice written into the modern civil service law under which the public employer must prove its case, through adverse witnesses, not through the compelled testimony of the employee under investigation.

These views were reflected in the plurality opinion of the Court in *Spevack* v. *Klein, supra,* which is not cited by the Court of Appeals, and in the dissenting opinion in *Nelson* v. *County of Los Angeles, supra.*

In *Spevack* v. *Klein, supra,* the Court held that the disbarment of an attorney for refusing, on grounds of self-incrimination, to testify and produce records in a state judicial inquiry into unethical practices violated his constitutional guarantee against self-incrimination under the Fourteenth Amendment. The Court said that the "self-incrimination clause of the Fifth Amendment [which] has been absorbed by the Fourteenth . . . should not be watered down by imposing . . . the loss of livelihood as a price for asserting it," *id.* at 514.

Overruling its earlier decision in *Cohen* v. *Hurly,* 366 U.S. 117, the Court said:

> "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words 'No person . . . shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. Like the school teacher in *Slochower* v. *Board of Education, supra,* and the policeman in *Garrity* v. *New Jersey, supra,* lawyers also enjoy first-class citizenship." *Spevack* v. *Klein, supra,* at 516.

The Court left open the question of whether "a policeman who invokes the privilege when his conduct as a police officer is questioned . . . may be discharged for refusing to testify," *Spevack* v. *Klein, supra,* at 516, although Mr.

Justice Fortas indicated that, subject to constitutional limitations, his answer would be in the affirmative. *Id.* at 520.

Nelson v. *Los Angeles County, supra,* did not involve a statute specifically directed, as here, at the privilege. Despite that fact, Justices Black and Douglas regarded the state's action as a violation of the privilege against self-incrimination and due process. Mr. Justice Black stated:

> "The basic purpose of the Bill of Rights was to protect individual liberty against governmental procedures that the Framers thought should not be used. That great purpose can be completely frustrated by holdings like this. I would hold that no State can put any kind of penalty on any person for claiming a privilege authorized by the Federal Constitution. The Court's holding to the contrary here does not bode well for individual liberty in America." 362 U.S. at 10.

It was the opinion of Mr. Justice Brennan that the case was "governed squarely by *Slochower*", *id.* at 11, despite the fact that "[t]he Court appears to treat the fact that the California statute is not in terms directed at the exercise of the privilege against self-incrimination, but rather covers all refusals to answer, as a factor militating in favor of its validity," *id.* at 11, n. 1.

These dissenting views, we believe, are reflected in the plurality opinion in *Spevack* v. *Klein, supra.* Nor, as indicated above, do we see any reason in principle why the privilege in this context should be limited to lawyers.

II.

Petitioners' dismissals from employment resulted from wiretapping in violation of the Federal Communications Act of 1934 and petitioners' constitutional rights under the Fourth and Fourteenth Amendments.

The investigation, suspension and dismissal of petitioners were the direct result of wiretapping by the respondent Commissioner of Investigation, in violation of the Federal Communications Act of 1934, 47 U.S.C. §§ 501, 605, and of petitioners' constitutional rights under the Fourth and Fourteenth Amendments against unreasonable search and seizure and against invasion of their privacy.

A. The wiretapping violated the Federal Communications Act.

Petitioners and those to whom they allegedly talked on the telephone plainly did not authorize the Commissioner of Investigation to intercept their conversations, to use them as a basis of interrogation or to divulge them to the Commissioner of Sanitation or to the District Attorney. Thus the Commissioner violated the statutory proscription that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purpose, effect, or meaning of such intercepted communications to any person," 47 U.S.C. § 605. This statute has received a broad construction from the Court in view of the congressional objective of protecting the conversations of persons using the telephones. See *Nardone* v. *United States*, 302 U.S. 379, 308 U.S. 338; *Goldstein* v. *United States*, 316 U.S. 114; *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920.

Violations of Section 605 are made criminal by Section 501 of the Act. The illegal wiretapping engaged in here invalidates the suspensions and dismissals of petitioners since Section 605 prohibits not only illegal wiretapping but also the fruits of illegal wiretapping.

> "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty." *Nardone* v. *United States,* 308 U.S. 338, 340

In the instant case, the complaint alleges that respondents', investigation and disciplinary actions against petitioners were the result of such wiretapping (R. 7a). The affidavits show that the wiretapping was the foundation stone of the interrogation (R. 18a, 72a).

B. The wiretapping violated petitioners' constitutional rights.

The wiretapping also constituted an unreasonable search and seizure and a violation of petitioners' constitutional rights of privacy under the Fourth and Fourteenth Amendments to the United States Constitution.

In *Olmstead* v. *United States, supra,* Justices Brandeis, Holmes, Stone and Butler, in three separate opinions, dissented from an affirmance of a criminal conviction based upon wiretapping which had occurred prior to the passage of the federal wiretapping law. The dissent of Mr. Justice Brandeis set forth the famous concept of the "right to be left alone":

> "To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed must be deemed a violation of the Fourth Amendment. And the use as evidence in a criminal proceedings of facts ascertained by such intrusion must be deemed a violation of the Fifth." *Id.* at 478-79.

Subsequent to *Olmstead,* the Court, in cases involving the use of evidence secured by wiretapping, based its decisions on the presence or absence of a physical "trespass" into a given area. Thus, in *Goldman* v. *United States,*

316 U.S. 129, the Court upheld a conviction where the evidence was secured by use of a receiver placed against the wall of defendant's office, while in *Silverman* v. *United States,* 365 U.S. 505, the Court reversed a conviction where an electronic listening device touched heating ducts in a house occupied by the defendants. This approach to the meaning of the Fourth Amendment's prohibition against unreasonable search and seizure was discarded by the Court in *Katz* v. *United States, supra.* There, the Court stated:

> "[o]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
>
> We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decision that the 'trespass' doctrine there enunciated can no longer be regarded as controlling . . . The fact that the electronic device . . . did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.* at 353.

The decision of the court below is in direct conflict with the Court's decision in *Berger* v. *United States, supra,* where the Court declared unconstitutional Section 813-a of the New York Code of Criminal Procedure, the very statute under which the Commissioner of Investigation obtained the wiretapping order in this case. The Court said:

> "We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth amendments." *Id.* at 44.

After analyzing the procedures set forth under the statute, the Court concluded:

> "New York's broadside authorization rather than being 'carefully circumscribed' so as to pre-

> vent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, *supra*, and which were then known as 'general warrants.'" *Id.* at 58.

and

> "In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." *Id.* at 60.

The concurring opinions of Justices Douglas and Stuart, *id.* at 64 and 68, and the dissenting opinions of Justices Black, Harlan and White, *id.* at 71, 91 and 107, explicitly recognize that the Court was declaring New York's statute unconstitutional on its face.

C. The City's alleged property rights in the telephone are not relevant to its violation of petitioners' statutory and constitutional rights.

The court below was in error in holding that petitioners are without statutory and constitutional rights because the telephone was "leased by the City of New York and assigned to the Department of Sanitation for the conduct of its official business" (R. 88a). Congress made no statutory exception based upon property rights to the telephone service. See *Benanti* v. *United States*, 355 U.S. 96; *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir. 1947); *United States* v. *Polakoff*, 112 F.2d 888 (2d Cir. 1940), *cert. denied*, 311 U.S. 653.

In this important respect the decision below is in direct conflict with the prior decision of the Second Circuit in the *Coplon* espionage case where the Government was held to have illegally intercepted the telephone conversations of its own employee in the offices of the Department of Justice, *United States* v. *Coplon*, *supra*.

Second, the determinative issue, for constitutional as well as statutory purposes, is not the ownership of the

telephone, but the privacy of the conversations. The lower court's reasoning is clearly in conflict with the Court's recent statement that "[w]e have recognized that the principal object of the Fourth Amendment is the protection of privacy, rather than property and have increasingly discarded ficitional and procedural barriers rested on property concepts." *Warden Maryland Penitentiary* v. *Hayden, supra*, at 304. See also *Berger* v. *New York, supra; Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541; *Griswold* v. *Connecticut*, 381 U.S. 479.

The respondents' reference to a "constitutionally protected area, within the purview of the Fourth Amendment protection"[4] has been conclusively answered by the Court's recent opinion in *Katz* v. *United States, supra.* There, in reversing a criminal conviction based upon evidence secured by the use of a listening device attached to the outside of a telephone booth from which the defendant was making a call, the Court departed from the narrow view of the Fourth Amendment which governed the decisions in such cases as *Olmstead* v. *United States, supra*, and *Silverman* v. *United States, supra.* The Court declared:

> "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of a Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-352.

The Court of Appeals was also clearly in error when it held that the search (by wiretapping) was not unreasonable because "[t]he conversations were being conducted in the course of the discharge of appellants' official duties" (R. 88a). There is no analogy to "public records and official

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[4] Brief in opposition to petition for certiorari, p. 14.

documents made or kept in the administration of public office", *ibid.*, quoting from *Wilson* v. *United States*, 221 U.S. 361, since there is an obvious difference between wiretapping a private telephone conversation which might disclose dereliction of the employee's duties and subpoenaing public records belonging to the government.

United States v. *Collins*, 349 F. 2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960, relied upon by the court below (R. 88a-89a) is equally inapposite. There, the search was limited to specific and identifiable objects, namely, the defendant's office desk and jacket. This is quite different from a wiretap which constitutes a "roving commission" to search out all telephone conversations; see *Berger* v. *New York, supra*, at 59.

D. Public employees require protection against illegal governmental surveillance.

The wiretapping of employees' conversations, which would have obviously been illegal had they been privately employed, is a serious violation of their right of privacy requiring judicial protection. The wiretapping is only one aggravated aspect of increasing governmental surveillance of public employees through electronic and other mechanical devices. See *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. (1965); *Hearings on S. 928 Before a Subcommittee of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. (1967).

New techniques have been developed which have greatly aided in this surveillance, techniques which have invaded traditional areas of individual privacy. Effective measures to protect this privacy have not kept pace with the new techniques of surveillance. See *Westin, Privacy and Freedom* (1967). If the privacy of government employees is to have continued meaning in our society it is imperative that the wiretapping engaged in here be recognized as violative of both the statute and the Constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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March 13, 1968

APPENDIX

NEW YORK CITY CHARTER, § 1123: Failure to testify.

If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

NEW YORK CODE OF CRIMINAL PROCEDURE, § 813-a: Ex parte order for eavesdropping.

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or

telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

FEDERAL COMMUNICATIONS ACT OF 1934, 47 U.S.C., § 501: General Penalty.

Any person who willfully and knowingly does or causes or suffers to be done any act, matter or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than

FEDERAL COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 605: Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena (sic) issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.